General at all times herein mentioned has acted and continues to act solely upon the conclusion that there is reasonable cause to believe that if petitioner were enlarged on bail he would engage in activities which would be prejudicial to the public interest and would endanger the welfare and safety of the United States. Petitioner denies that there is reasonable or any cause for such conclusion or for such belief, denies that he has engaged at any time in any such activities or conduct, and specifically denies that he will engage in or plans, intends, contemplates, proposes or considers engaging in, if enlarged on his bond, any activities or conduct which would be prejudicial to the public interest or would endanger the welfare or safety of the United States. Petitioner has never been informed or advised by the Attorney General or by any agent or subordinate of the Attorney General of the facts, if any, upon which the Attorney General bases the conclusion that there is reasonable cause [fol. 17] to believe petitioner, if enlarged, would engage in such activities; nor upon what past activities of petitioner, if any, the Attorney General relies for such conclusion; nor what activities the Attorney General anticipates would be engaged in by petitioner if he should be enlarged; nor in what respect such activities if engaged in are deemed by the Attorney General to be prejudicial to the public interest or to endanger the welfare and safety of the United States. Petitioner further alleges that repeatedly since his said arrest on October 21, 1950, he has requested such information of said District Director as agent of the Attorney General and that said District Director at all times since October 21, 1950, has failed and refused to furnish such information or any information whatever with respect to the reasons for petitioner's detention.

Dated: This 6th day of November, 1950.

Margolis and McTernan, By (S.) John W. Porter, R.S.R., Attorneys for Petitioner.

[File endorsement omitted.]

[fol. 18] IN UNITED STATES DISTRICT COURT

RETURN TO ORDER TO SHOW CAUSE WHY WRIT SHOULD NOT BE GRANTED

I, Herman R. Landon, District Director of the Immigration and Naturalization Service, United States Department of Justice, Los Angeles, California, respondent herein, as and for my return to order to show cause why writ of habeas corpus should not be granted in the above entitled case, respectfully states:

I

That Frank Carlson, also known as Solomon Skolnick, hereafter referred to as the petitioner is not being illegally restrained by me of his liberty, but is in my custody under proper and lawful authority.

II

That the said petitioner is in my custody pursuant to a warrant of arrest, dated October 31, 1950, issued by authority of the Attorney General, directing that the petitioner be taken into custody and granted a hearing to enable him to show cause why he should not be deported in conformity with law, a certified copy of which is attached hereto as a part of this return and marked Exhibit "A".

III

That there is reasonable cause to believe that if the said petitioner were enlarged on bail he would engage in activities which would be prejudicial to the public interest, and would endanger the welfare and safety of the United States.

[fol. 19] Wherefore, I, Herman R. Landon, District Director, Immigration and Naturalization Service, United States Department of Justice, pray that the said petition for issuance of a writ of habeas corpus in the case of the petitioner be denied.

(S.) Herman R. Landon, District Director, Immigration & Naturalization Service, United States Department of Justice, District No. 16.

Duly sworn to by Herman R. Landon. Jurat omitted in printing.

[fol. 20] EXHIBIT "A" TO RETURN

United States of America

Department of Justice

Immigration and Naturalization Service

Los Angeles, California

November 6, 1950.

CERTIFICATION

By virtue of the authority vested in me by 8 C.F.R. 373.7, a regulation issued by the Commissioner of Immigration and Naturalization with the approval of the Attorney General pursuant to 5 U.S.C. 22 and 311, and 8 U.S.C. 102, 222, 458 and 727,

I hereby certify that the annexed document, a Warrant of Arrest, is a true copy of the original thereof from the records of the said Immigration and Naturalization Service, Department of Justice, relating to Salomon Sokolnick, File No. 245-P-76468, of which the Attorney General is the legal custodian.

In witness whereof I have hereunto set my hand and caused the seal of the Department of Justice, Immigration and Naturalization Service, to be affixed, on the day and year first above written.

Herman R. Landon, District Director, Immigration and Naturalization Service. (Seal.)

[fol. 21] Warrant

For Arrest of Alien

United States of America

Department of Justice

Los Angeles, Calif.

A-5634646

No. 245-P-76468

To District Enforcement Officer, Los Angeles, California or to any Immigrant Inspector in the service of the United States:

Whereas, from evidence submitted to me, it appears that the alien Salomon Sokolnick alias Solomon Skolnick or

Sol Skolnick alias Frank Carlson who entered this country at New York, New York on the 23rd day of August 1920 has been found in the United States in violation of the immigration laws thereof, and is subject to be taken into custody and deported pursuant to the following provisions of law, and for the following reasons, to wit:

The Act of Oct. 16, 1918, as amended, in that he has been, after entry, a member of the following class set forth in Section 1(2)(c) of said Act: An alien who was a member of the Communist Party of the United States.

I, by virtue of the power and authority vested in me by the laws of the United States, hereby command you to take into custody the said alien and grant him a hearing to enable him to show cause why he should not be deported in conformity with law. The expenses of detention, here-[fol. 22] under, if necessary, are authorized payable from the appropriation "Salaries and Expenses, Immigration and Naturalization Service, 1951."

Pending determination of deportability, the alien named is to be continued in custody. This warrant supersedes that issued on the 20th day of October, 1947.

For so doing, this shall be your sufficient warrant.

Witness my hand and seal this 31st day of October, 1950.

(S.) H. R. Landon, District Director.

Endorsed: Filed Nov. 6, 1950. Edmund L. Smith, Clerk, by Wm. A. White, Deputy Clerk.

Acknowledgment of Service

Receipt is hereby acknowledged this 6th day of November, 1950, of a copy of the Return to Order to Show Cause Why Writ of Habeas Corpus Should not be Granted, in the above-entitled and numbered case.

John W. Porter, Attorney for Petitioner, by (S.) John W. Porter.

[fol. 23] IN UNITED STATES DISTRICT COURT

MOTION TO STRIKE PORTIONS OF RETURN TO ORDER TO SHOW CAUSE—Filed November 17, 1950

Frank Carlson, petitioner herein, hereby moves the above entitled Court to strike from the Return of Herman R. Landon to the order to show cause herein the following portions thereof, upon the ground that the same are, and each of them is sham, irrelevant, not a factual response, and a mere conclusion:

(1) All of paragraph I thereof.
(2) All of paragraph III thereof.

Said motion is based upon the petition of petitioner herein, the attached memorandum of points and authorities, and all of the other records and files herein.

Dated: November 6, 1950.

Margolis and McTernan, by (S.) John W. Porter, Attorneys for Petitioner.

(Affidavit of Service by Mail.)

[File endorsement omitted.]

[fol. 24] IN UNITED STATES DISTRICT COURT

ANSWER TO RETURN TO ORDER TO SHOW CAUSE WHY WRIT SHOULD NOT BE GRANTED—Filed November 7, 1950

Comes now Frank Carlson, petit-oner herein, and for his answer to the Return of H. R. Landon, District Director of the Immigration and Naturalization Service, Los Angeles, California, respondent herein, admits, denies and alleges as follows:

I

Alleges that such Return in whole, and particularly paragraphs I and III thereof, fails to set forth facts sufficient to constitute a return to the order to show cause herein.

II

Alleges that such Return in whole, and particularly paragraphs I and III thereof, fails to set forth facts sufficient to show any cause why the writ prayed for by the petitioner, on file herein, should not be granted, and fails to set forth any fact whatever responsive to said order to show cause.

III

Answering paragraph I of said Return, denies that petitioner is not being illegally restrained of his liberty by respondent, and denies that petitioner is in the custody of respondent under proper and lawful authority.

IV

Answering paragraph II of said Return, admits that [fol. 25] petitioner is in the custody of respondent under color of a warrant of arrest dated October 31, 1950, a certified copy of which warrant is attached to said Return and marked Exhibit A, and alleges that such custody is unlawful and an abuse of discretion on the part of respondent and of the Attorney General of the United States.

V

Answering paragraph III of said Return, denies that there is reasonable or any cause to believe that if petitioner were enlarged on bail he would engage in activities which would be prejudicial to the public interest and would endanger the welfare and safety of the United States, and in connection therewith refers to and by this reference incorporates herein as if fully set forth each and all of the denials and allegations set forth in his amendment to the Petition for Writ of Habeas Corpus on file herein, designated paragraph XVIIIA thereof.

VI

Refers to the allegations of his Petition for writ of Habeas Corpus on file herein, set forth in paragraphs I to XX inclusive, and by this reference incorporates each and all of the allegations thereof as if the same were fully set forth herein.

Wherefore, petitioner prays that a writ of habeas corpus issue and that he be forthwith restored to his liberty upon [fol. 26] reasonable bond.

Margolis and McTernan, by (S.) John W. Porter, Attorneys for Petitioner.

(Affidavit of Service by Mail.)

[File endorsement omitted.]

[fol. 27] IN UNITED STATES DISTRICT COURT

MINUTE ENTRY OF TRIAL AND DISPOSITION OF CASE

At a stated term, to wit: The September Term, A. D. 1950, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Friday, the 10th day of November, in the year of our Lord one thousand nine hundred and fifty.

Present: The Honorable Ben Harrison, District Judge.

In Re: Frank Carlson, aka Solomon Skolnick, No. 12,491—BH—Civil

In Re: Miriam Christine Stevenson, etc., No. 12,492—BH—Civil

In Re: Harry Carlisle, aka Harry Carlyle, No. 12,503—BH—Civil

In Re: David Hyun, No. 12,505—BH—Civil

(Same order in each case:) At 2 P.M. court convenes herein and each of the petitioners appearing by their counsel of record, and Walter S. Binns, Ass't. U.S. Att'y, appearing as counsel for respondent;

Written stipulation for submission of action is presented and filed.

The Court, at this time, states that an Opinion of the Court will later be filed, and orders the Writ discharged. Counsel for respondent is directed to prepare and present proposed order discharging the Writ, for signature.

Application is made on behalf of petitioner that the Court fix the amount of bail pending appeal, and the Court orders said application denied.

[fol. 28] IN UNITED STATES DISTRICT COURT

STIPULATION FOR SUBMISSION OF ACTION—Filed November 10, 1950

It is hereby Stipulated by and between the undersigned counsel for the petitioner and for the respondent herein that:

(1) The above entitled matter has been submitted to the Court upon a record consisting of:

(a) The Petition for Writ of Habeas Corpus, as amended with leave of the Court, by the Amendment to Petition for Writ of Habeas Corpus;

(b) The Order to Show Cause why writ of habeas corpus should not issue;

(c) The respondent's Return to the Order to Show Cause Why Writ Should Not Be Granted;

(d) The petitioner's Motion to Strike Portions of Return to Order to Show Cause;

(e) The petitioner's Answer to Return to Order to Show Cause Why Writ Should Not Be Granted;

(f) This Stipulation.

(2) The Motion to Strike Portions of Return to Order to Show Cause has been denied.

(3) The petitioner waives oral testimony in support of the petition and Answer and submits the matter upon the foregoing record and stipulation, without offering any oral testimony, notwithstanding that the Court has offered to receive such testimony.

[fol. 29] (4) For the purpose of this record it is deemed that a writ of habeas corpus has been issued and that hearing has been had upon a return to the writ. For said purpose the Return to Order to Show Cause Why Petition For Writ of Habeas Corpus Should Not Be Granted and the Answer thereto are deemed the return and traverse to the writ. The determination upon this hearing shall be either that the writ is granted or that the writ is discharged.

Dated: November 9, 1950.

Margolis and McTernan, by (S.) John W. Porter,
Attorneys for Petitioner.

Ernest A. Tolin, United States Attorney. (S.) Walter S. Binns, Chief Assistant United States Attorney.

Ray H. Kinnison, Assistant United States Attorney, Chief of Criminal Division, Attorneys for Respondent. H. R. Landon, District Director.

[File endorsement omitted.]

[fol. 30] In the District Court of the United States, Southern District of California, Central Division

No. 12491—BH

In the Matter of Frank Carlson, Also Known as Solomon Skolnick, Petitioner for Writ of Habeas Corpus

No. 12492—BH

In the Matter of Miriam Christine Stevenson, Formerly Burroughs, nee Kenkel, alias Miki Ashton, Petitioner for Writ of Habeas Corpus

No. 12503—BH

In the Matter of Harry Carlisle, Also Known as Harry Carlyle, Petitioner for Writ of Habeas Corpus

No. 12505—BH

In the Matter of David Hyun, Petitioner for Writ of Habeas Corpus

Opinion—Filed November 10, 1950

Appearances:

Margolis & McTernan, by John W. Porter, 112 West Ninth Street, Los Angeles 15, California, for Petitioner Frank Carlson.

Rose S. Rosenberg, 112 West Ninth Street, Los Angeles 15, California, for Petitioner Miriam Christine Stevenson. [fol. 31] Stanley Fleishman, 1614 North Argyle Avenue, Hollywood 28, California, for Petitioner Harry Carlisle.

Milton S. Tyre, 650 South Grand Avenue, Los Angeles 17, California, for Petitioner David Hyun.

A. L. Wirin, 416 Douglas Building, Los Angeles 12, California, Amicus Curiae.

Ernest A. Tolin, United States Attorney; Walter S. Binns, Chief Assistant United States Attorney; Ray H. Kinnison, Assistant United States Attorney; Howard L. Field, District Adjudication Officer, U. S. Immigration and Naturalization Service, Department of Justice, U. S. Post Office and Court House, Los Angeles 12, California. Attorneys for Respondent.

In the above entitled habeas corpus proceedings which were initiated to secure the release on bail of several aliens held without bail by the immigration authorities pending final determination of their cases, an order to show cause was issued and a return thereto filed by the Attorney General. The petitioners, through oral argument and by means of briefs presented to the court, contend that the return to the order to show cause is insufficient and that they are entitled to their discharge on the state of the record as a [fol. 32] matter of law. The return contained a copy of the warrant of arrest wherein the petitioners were retained in custody under authority of Section 156, Title 8 U.S.C.A., as amended by the Internal Security Act of 1950 (U.S. Congressional Service p. 3740-3762). Said section as amended in part reads as follows:

> "* * * Pending final determination of the deportability of any alien taken into custody under warrant of the Attorney General, such alien may, in the discretion of the Attorney General (1) be continued in custody; or (2) be released under bond in the amount of not less than $500, with security approved by the Attorney General; (3) be released on conditional parole. * * *"

The government contends that this provision of the law as amended gives the Attorney General *absolute* discretion in the matter of bail, and that this court has no jurisdiction to review the exercise of this discretion.

The court cannot accept the contention of either of the parties. I am of the opinion that the amendments, insofar as material to this matter, were a legislative adoption of

clarifying language read into the original Section 156 by certain rulings of the Second Circuit, and not a change in the law giving the Attorney General absolute discretion. In U. S. ex rel. Zapp v. District Director etc., 120 F. (2d) 762, (2nd Cir.), reading at page 765 the following language [fol. 33] is used:

> "The natural interpretation of the language used, that the alien 'may be released under a bond', would indicate that the release is discretionary with the Attorney General; * * *"

This same view of the discretionary power of the Attorney General was reiterated and more clearly defined in U. S. ex rel. Potash v. District Director etc., 169 F. (2d) 747 (2nd Cir.), wherein the court stated:

> "The foregoing decisions and also, as it seems to us, the general spirit of our institutions make it improbable that Congress intended to give the Attorney General unlimited power over the admission to bail of aliens against whom deportation proceedings are brought. We think that it requires more than the general grant of power to fix bail in Section 156 to exempt the Attorney General from all control in the exercise of that function even if he should be shown to have acted in an arbitrary manner. This interpretation is particularly indicated in such a situation as the present where personal liberty is involved and there has been no determination that the alien is deportable."

[fol. 34] The language of these decisions together with a careful comparison of the language of the respective statutes indicates that no such grant of power as is contended for by the government was given by the amendments to 8 U.S.C.A. 156 contained in the new Internal Security Act of 1950. It would have been a comparatively simple matter for Congress to indicate an intent to give such power to the Attorney General. There is nothing in the legislative history, however, to show that Congress did intend such exclusive right. The Zapp case established that the admission to bail was discretionary with the Attorney General. The Potash case held that such discretion is not an unbridled one.

It is equally clear since the Potash case, supra, that one who claims an abuse of such discretion has the burden of proving abuse by clear and convincing evidence. This is clearly set forth at page 751:

"* * * The discretion of the Attorney General which we held to exist in the Zapp case is interpreted as one which is to be reasonably exercised upon a consideration of such factors, among others, as the probability of the alien being found deportable, the seriousness of the charge against him, if proved, the danger to the public safety of his presence within the community, and the alien's availability for subsequent proceedings if enlarged on bail. However, in any consideration of his denial of bail it should always be borne in mind [fol. 35] that the court's opinion as to whether the alien should be admitted to bail can only override that of the Attorney General *where the alien makes a clear and convincing showing* that the decision against him was without a reasonable foundation. In the absence of such proof, the administrative determination is final. If the Eighth Amendment to the Constitution is considered to have any bearing upon the right to bail in deportation proceedings, and this has been denied, it is our opinion that the provisions of that Amendment and any requirement of the due process provisions of the Fifth Amendment will be fully satisfied if the standards of fairness and reasonableness we have set forth regarding the exercise of discretion by the Attorney General are observed." (Emphasis supplied)

In approaching questions involving the admission or expulsion of aliens it should be remembered, and it has been repeatedly affirmed by the courts, that this function may be conferred upon the executive branch of the government by the Congress and the judiciary has only such authority to interfere as may be delegated to it.

In Wong Wing et al. v. U. S. 163 U. S. 228, 16 S. Ct. 977, the court stated:

"But this court held, in the case of Fong Yue Ting v. U. S., 149 U. S. 698, 13 S. Ct. 1016, that the right to [fol. 36] exclude or to expel aliens, or any class of aliens, absolutely or upon certain conditions, in war or in peace, is an inherent and inalienable right of

every sovereign and independent nation; that the power of congress to expel, like the power to exclude, aliens or any class of aliens from the country, may be exercised entirely through executive officers; and that the said sixth section of the act of May 5, 1892, was constitutional and valid.

* * * * * * *

"'The power of congress to exclude aliens altogether from the United States, or to prescribe the terms and conditions upon which they may come to this country, and to have its declared policy in that regard enforced exclusively through executive officers, without judicial intervention, is settled by our previous adjudications.'"

The same thought is expressed in U. S. ex rel. Carapa v. Curran etc., 297 F. 946 (2nd Cir,), where the following language is used:

"It is, however, to be observed that the provision above quoted applies to the case of a person arrested or imprisoned on process issued from any court of the United States in any civil action. An alien who is denied the right to enter the United States and who is [fol. 37] held by the immigration authorities for deportation is not held on process issued 'from any court of the United States in any civil action'. On the contrary, he is held by the immigration authorities under authority conferred upon them by the act of Congress regulating immigration. The deportation proceeding is sui generis, and the authority of the immigration officials is not derived from the courts as the result of any civil action whatever. If a District Court, on an application for a writ of habeas corpus, *inquiries* into the legality of a deportation order and finds that the immigration authorities have not exceeded their authority but that they have proceeded lawfully and has remanded the alien to their custody, he is in their custody, not because of any authority which those officials have derived from the court but under the authority conferred upon the Executive by the acts of Congress.

"The power to admit to bail is not a mere matter of practice. In the United States the right to bail is

thought to be dependent on statutes. 3 Am. & Eng. Encyc. of Law 591; 6 C.J. 894."
(See also 3 C. J. S. 590 et seq.)

In 1904 in the case of U. S. ex rel. John Turner v. William Williams etc. 194 U.S. 279, 24 S. Ct. 719-724, involving an anarchist. Mr. Chief Justice Fuller, speaking for the court, [fol. 38] among other things said:

"* * * The flaming brand which guards the realm where no human government is needed still bars the entrance; and as long as human *governments* endure they cannot be denied the power of self-preservation, as that question is presented here."

Both in U.S. ex rel. Zapp v. District Director etc., supra, and U. S. ex rel. Potash v. District Director etc., supra, it is to be noted that one of the factors to be considered in determining the admissibility of an alien to bail is the danger to the community by the presence of the alien. I assume the same rule that applies to one who has smallpox applies as well to an alien who is being held pursuant to a warrant for his arrest charging him with being deportable because of membership in an organization that advocates the overthrow of the government by force and violence. Both are menaces to public safety and security.

In the instant cases the court repeatedly, following the reasoning of the Potash case, invited petitioners to produce any evidence that would rebut the presumption of regularity flowing from the issuance of the warrant attached to the return. This warrant stated that the Attorney General was holding the petitioners without bail pending deportation proceedings because of their membership in the Communist Part of the United States. Such evidence was essential to overcome the presumption and to prove an abuse of discretion by the Attorney General. All refused [fol. 39] to prefer any evidence whatsoever and stated through counsel that they rested their cases upon the written record. Thus the court had before it no evidence whatsoever upon which it could make any findings on the question of the abuse of discretion.

The court must assume that the acts of the Attorney General were regular and free from any abuse of discretion in the absence of evidence to the contrary. It cannot override the opinion of the Attorney General where the

alien fails to make a clear and convincing showing that the decision against him is without reasonable foundation.

The petitions for writ of habeas corpus are hereby discharged.

The United States Attorney is directed to prepare forthwith for my signature proper orders of dismissal in conformity with the opinions herein expressed.

Dated: This 10 day of November, 1950.

(S.) Ben Harrison, Judge.

[File endorsement omitted.]

[fol. 40] IN THE UNITED STATES DISTRICT COURT IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

No. 12491-BH

In the Matter of FRANK CARLSON, also known as SOLOMON SKOLNICK, Petitioner for Writ of Habeas Corpus

ORDER DISMISSING PETITION FOR WRIT OF HABEAS CORPUS AND DISCHARGING WRIT—November 13, 1950

The above-entitled matter came on regularly for hearing on an Order to Show Cause why a petition for writ of habeas corpus should not be granted on November 7, 1950 in the above-entitled Court before the Honorable Ben Harrison, the petitioner being represented by his counsel, Margolis and McTernan, and the respondent by his counsel, Ernest A. Tolin, United States Attorney, appearing by Walter S. Binns and Ray H. Kinnison, Assistant United States Attorneys; and the Court having read the petition and the return on file and heard arguments, and the parties by their attorneys having stipulated that a writ of habeas corpus be deemed to have issued and that the return on file be considered as the return to said writ; and the petitions as amended be deemed a traverse by petitioner; and it being further stipulated that the petitioner did not desire to pre-[fol. 41] sent evidence in support of the traverse;

It is hereby ordered, adjudged and decreed that the petition for writ of habeas corpus herein is dismissed, and that

the writ of habeas corpus issued herein be and hereby is discharged.

Dated: November 13, 1950.

(S.) Ben Harrison, United States District Judge.

Approved as to form: Margolis and McTernan, by (S.) John W. Porter, Attorneys for Petitioner.

Judgment entered Nov. 13, 1950. Book 69, Page 181. Edmund L. Smith, Clerk, by C. A. Simmons, Deputy.

[File endorsement omitted.]

[fol. 42] IN UNITED STATES DISTRICT COURT

NOTICE OF APPEAL—Filed November 13, 1950

Notice is hereby given that Frank Carlson, petitioner above named hereby appeals to the United States Court of Appeals for the Ninth Circuit, from the order discharging the writ of habeas corpus herein, made and entered in this action by the United States District Court, Honorable Ben Harrison, Judge Presiding, on the 13th day of November, 1950.

Dated: This 13th day of November, 1950.

Margolis and McTernan, by (S.) John W. Porter, Attorneys for Petitioner.

Received copy of the within Notice of Appeal this 13th day of November, 1950.

Ernest A. Tolin, U. S. Attorney, by (S.) Walter S. Binns, Attorney for United States of America.

[File endorsement omitted.]

[fol. 43] IN UNITED STATES DISTRICT COURT

STIPULATION AS TO RECORD ON APPEAL—Filed November 14, 1950

It is hereby stipulated by and between the undersigned counsel for the Petitioner-Appellant and the Respondent herein that the following papers shall constitute the record